Joint Employers and the National Labor Relations Act

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Summary

This report examines the standard used currently by the National Labor Relations Board ("Board") to determine whether two businesses may be considered joint employers for purposes of the rights and protections afforded by the National Labor Relations Act ("NLRA"). In a June 2014 amicus brief filed with the Board, the Board's General Counsel encouraged the adoption of a new joint employer standard that would consider the totality of the circumstances, including how the alleged joint employers have structured their commercial relationship. Following the filing of the amicus brief, the General Counsel also authorized complaints to be filed against McDonald's, USA, LLC ("McDonald's USA"), and its franchisees, as joint employers, for alleged violations of the NLRA. These activities may arguably suggest that a change in the Board's joint employer standard may be imminent.

In addition to reviewing the Board's joint employer standard, the report also discusses *Browning-Ferris Industries of California*, the case that prompted the General Counsel's amicus brief, and the unfair labor practice allegations involving McDonald's USA.

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In July 2014, the General Counsel of the National Labor Relations Board ("Board") announced that he had authorized complaints against McDonald's, USA, LLC ("McDonald's USA"), for alleged violations of the National Labor Relations Act ("NLRA" or "the Act") by the company and its franchisees.[1] Prior to the announcement, numerous charges of unfair labor practices had been investigated by the Office of General Counsel. These charges involved a variety of actions, including terminations and reductions in hours, undertaken allegedly in response to union organizing.

The effort to recognize McDonald's USA and its franchisees as joint employers of the individuals who have alleged unfair labor practices is consistent with the General Counsel's other attempts to have the Board reevaluate when an entity will be considered a joint employer. In a June 2014 amicus brief, for example, the General Counsel encouraged the Board to abandon its existing joint employer standard, which has been in place since 1984.[2]

If the Board were to adopt a new standard that made it more likely for parties in a franchise arrangement to be considered joint employers, some contend that it could have a significant impact on the economy and small-business ownership.[3] Some companies, it is argued, might be reluctant to establish franchise relationships for fear of being exposed to possible unfair labor practice claims.[4] Nevertheless, the General Counsel maintains that the Board's current standard ignores Congress's intent that the term "employer" in the NLRA should be construed broadly in light of economic realities and the statute's underlying goals.[5]

This report examines the Board's existing joint employer standard. The report also reviews *Browning-Ferris Industries of California*, the case that prompted the General Counsel's amicus brief, and the unfair labor practice allegations involving McDonald's USA.

The NLRA and the Board's Joint Employer Standard

The NLRA recognizes the right of employees to engage in collective bargaining through representatives of their own choosing.[6] By "encouraging the practice and procedure of collective bargaining," the Act attempts to mitigate and eliminate labor-related obstructions to the free flow of commerce.[7] The NLRA also prohibits certain misconduct by both employers and unions that interferes with the collective bargaining right. Section 8(a)(1) of the NLRA states that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[8] Similarly, section 8(b)(1)(A) of the NLRA

[1] Office of General Counsel, Nat'l Lab. Relations Board, NLRB Office of General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer (July 29, 2014), http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds.

[2] Amicus Brief of the General Counsel at 2, Browning-Ferris Industries of California, Inc., Case 32-RC-109684 (NLRB June 26, 2014). The General Counsel works independently from the Board and is responsible for the investigation and prosecution of unfair labor practice cases, and for the supervision of the Board's field offices.

[3] *See* Jay-Anne Casuga, *NLRB General Counsel Issues 13 Complaints Alleging McDonald's Jointly Liable for ULPs*, 28 Lab. Rel. Week (BNA), at 2725 (December 21, 2014).

[4] *Id*.

[5] Amicus Brief of the General Counsel, *supra* note 2.

[6] 29 U.S.C. §§151-169.

[7] *See* 29 U.S.C. §151.

[8] 29 U.S.C. §158(a)(1). Section 7 of the NLRA, 29 U.S.C. §157, recognizes the right of employees to engage in collective bargaining.

provides that it shall be an unfair labor practice for a labor organization or its agents to "restrain or coerce ... employees in the exercise of the rights guaranteed in section 7 ..."[9]

When individuals work pursuant to an arrangement that involves two businesses, such as a contract that provides for one business supplying workers to another, questions may arise concerning which entity should be considered the "employer" for purposes of the NLRA. In some cases, these businesses may be deemed joint employers because they both exercise some control over the individuals' terms and conditions of employment. In *NLRB v. Browning-Ferris Industries of Pennsylvania*, the U.S. Court of Appeals for the Third Circuit ("Third Circuit") observed: "[T]he 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment."[10]

In 1984, the Board established a joint employer standard that followed the Third Circuit's reasoning in *Browning-Ferris Industries of Pennsylvania*. In *Laerco Transportation & Warehouse*, the Board considered whether Laerco, a provider of trucking and warehouse services, and CTL, a company that provided drivers to Laerco, were joint employers.[11] Citing the Third Circuit's opinion, the Board elaborated on the court's standard, noting: "To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[12]

In *Laerco Transportation*, the record indicated that CTL made all of the employment decisions with regard to the drivers provided to Laerco, and was primarily responsible for resolving most problems that arose with the drivers. In addition, any supervision of the drivers provided by Laerco was minimal and routine. In light of these factors, the Board concluded that Laerco did not possess sufficient control over CTL's employees to support a joint employer finding.

In *TLI, Inc*., another 1984 case involving drivers provided by one company to another, the Board confirmed that there must be a showing that an employer meaningfully affects matters relating to the employment relationship to establish joint employer status.[13] In this case, the Board concluded that Crown Zellerbach, a forest products company that leased drivers from TLI, was not a joint employer of these drivers because it had little impact on the terms and conditions of their employment. The Board explained that Crown did not hire or terminate the drivers, and did not discipline them. In addition, the Board found that the supervision and direction exercised by Crown on a day-to-day basis was limited and routine. Because Crown appeared to exercise only minimal control over the drivers, the Board maintained that it should not be deemed a joint employer.

While the Board has continued to follow the joint employer standard established in *Laerco Transportation*, its solicitation of briefs in *Browning-Ferris Industries of California* may arguably signal a willingness to revise that standard.[14] *Browning-Ferris Industries of California* was decided by the regional director of the Board's Region 32 in August 2013.[15] In April 2014, the

[9] 29 U.S.C. §158(b)(1)(A).

[10] 691 F.2d 1117, 1123 (3d Cir. 1982).

[11] 269 NLRB 324 (1984).

[12] *Id*. at 325.

[13] 271 NLRB 798 (1984).

[14] *See* Notice and Invitation to File Briefs, Browning-Ferris Industries of California, Inc., Case 32-RC-109684 (NLRB May 12, 2014).

[15] 2013 WL 8480748 (NLRB August 16, 2013). The Board's Region 32 encompasses Oakland, CA.

Board agreed to review the regional director's decision because "it raises substantial issues warranting review."[16]

In *Browning-Ferris Industries of California*, the regional director considered whether Browning-Ferris, a waste management company, is a joint employer of individuals provided by Leadpoint Business Services to perform sorting and housekeeping duties. The dispute arose after a union petitioned to represent all full and regular part-time workers employed by Leadpoint and Browning-Ferris. After examining the relationship between the parties and the relevant workers, the regional director concluded that Browning-Ferris and Leadpoint are not joint employers.

Citing a labor services agreement between the parties, the regional director noted that Leadpoint has the sole authority to set the wage rates for the employees it provides to Browning-Ferris.[17] In addition, under the agreement, Leadpoint has the sole responsibility to counsel, discipline, and terminate employees assigned to Browning-Ferris.[18] The regional director further noted that Browning-Ferris does not control the daily work performed by the employees provided by Leadpoint. Quoting *TLI, Inc.*, the regional director concluded that Browning-Ferris "does not 'share, or co-determine [with Leadpoint] those matters governing the essential terms and employment' of Leadpoint's housekeepers, sorter, or screen cleaners at [Browning-Ferris's] Facility.'"[19]

After agreeing to review the regional director's decision in *Browning-Ferris Industries of California*, the Board invited the filing of briefs, including amicus briefs, to address the issues raised in the case. The parties and amici were invited to address one or more of the following questions:

> 1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.* ... and *Laerco Transportation* ... is Leadpoint Business Services the sole employer of the petitioned-for employees?
>
> 2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?
>
> 3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?[20]

In an amicus brief, the Board's General Counsel urged the Board to abandon its current joint-employer standard, contending that "it undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining."[21] The General Counsel declined to address the Board's first question, but provided responses for the second and third questions. The General Counsel encouraged the Board to adopt a new standard that considers the totality of the circumstances, including how the alleged joint employers have structured their commercial relationship. The General Counsel reasoned that this new standard would allow the Board to find joint employer status where industrial realities make an entity essential for meaningful bargaining.[22] For example, a company that receives workers from a "supplier" company and that

[16] Order, Browning-Ferris Industries of California, Inc., Case 32-RC-109684 (NLRB April 30, 2014).

[17] *Id*. at 3.

[18] *Id*. at 4.

[19] *Id*. at 9.

[20] Notice and Invitation to File Briefs, *supra* note 14 (citations omitted).

[21] Amicus Brief of the General Counsel, *supra* note 2 at 2.

[22] *Id*. at 17.

has some control over the wages paid by the supplier company should be deemed a joint employer because meaningful bargaining over wages could not occur without its involvement. In this way, the standard proposed by the General Counsel would recognize the potential to control terms and conditions of employment as sufficient to find joint employer status.[23]

Whether the Board will adopt a new joint employer standard is not clear. Amicus briefs for *Browning-Ferris Industries of California* were due by June 26, 2014. The parties to the case were required to file their briefs by July 10, 2014. The Board has not indicated when a decision will be issued.

McDonald's USA and the Joint Employer Standard

At least 310 unfair labor practice charges involving McDonald's USA and its franchisees have been filed with the Board.[24] While many of these cases have been closed, 107 cases have been found to have merit.[25] Regional directors in at least 17 of the Board's regions have issued complaints against McDonald's USA and its franchisees as joint employers. In a fact sheet devoted to the McDonald's USA cases, the Board maintains that "McDonald's, USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act."[26]

In general, the complaints issued against McDonald's USA and its franchisees appear to follow a similar pattern. The complaints identify the existence of a franchise agreement between McDonald's USA and the franchisee, indicate that McDonald's USA possessed and/or exercised control over the labor relations policies of the franchisee, and state that McDonald's USA is a joint employer of the franchisee's employees.[27] The complaints also describe the alleged misconduct that would constitute a violation of the NLRA, if true, such as termination because of union activity, and threats of reprisal for engaging in union activity.[28]

In his amicus brief for *Browning-Ferris Industries of California*, the General Counsel argued that the current joint employer standard undermines meaningful collective bargaining when there is a franchise relationship:

> In these commercial arrangements, an employer inserts an intermediary between it and the workers and designates the intermediary as the workers' sole "employer." But notwithstanding the creation of an intermediary, franchisors typically dictate the terms of franchise agreements and "can exert significant control over the day-to-day operations of their franchisees," including the number of workers employed at a franchise and hours each employee works.[29]

If the Board adopts the totality of the circumstances standard advocated by the General Counsel, and further examination of the franchise relationship between McDonald's USA and its

[23] *Id*. at 21.

[24] *See* Nat'l Lab. Relations Board, McDonald's Fact Sheet, *available at* http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet (last visited April 6, 2015).

[25] *Id*.

[26] *Id*.

[27] *See, e.g.*, Complaint and Notice of Hearing, Rivers Holding, Ltd., Case 14-CA-136430 (NLRB December 19, 2014).

[28] *See, e.g.*, Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, AJD, Inc., Case 02-CA-093895 (NLRB February 13, 2015).

[29] Amicus Brief of the General Counsel, supra note 2 at 14 (footnotes omitted).

franchisees reveals that the influence of McDonald's USA over the working conditions of its franchisees' employees is significant enough that bargaining has to include McDonald's USA to be meaningful, it seems likely that the Board would conclude that McDonald's USA and its franchisees are joint employers. Nevertheless, the General Counsel has also emphasized that a franchisor will probably not be considered a joint employer if it simply sets rules or policies to maintain the uniformity of brand or product quality.[30]

In a December 2014 statement, McDonald's USA seemed to highlight brand quality as a hallmark of its franchise agreements:

> McDonald's serves its 2,500 independent franchisees' interests by protecting and promoting the McDonald's brand and by providing access to resources related to food quality, customer service, and restaurant management, among other things. These optional resources help entrepreneurs operate successful businesses. This relationship does not establish a joint employer relationship under the law ...[31]

McDonald's USA also emphasized the need for further fact-finding before a final resolution could be reached. Such a resolution may be years away, however, as many expect the cases involving McDonald's USA and Browning-Ferris Industries of California to be appealed after the Board issues its decisions.

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Disclaimer

[30] Lawrence E. Dube, NLRB Officials Encounter Few Fireworks in House Panel Hearing on FY 2016 Budget, 56 Daily Lab. Rep. (BNA) at A-3 (March 24, 2015).

[31] McDonald's, USA, LLC, McDonald's Statement on NLRB Actions (December 19, 2014), *available at* http://news.mcdonalds.com/Corporate/Media-Statements/McDonald%E2%80%99s-Statement-on-NLRB-Actions (last visited April 6, 2015).